E-Filed Document Jul 17 2014 08:56:37 2014-WC-00364-COA Pages: 28

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF STATE OF MISSISSIPPI

SANDERSON FARMS, INC. **APPELLANT**

VS. **NO. 2014-WC-00364-COA**

TANYA JESSIE **APPELLEE**

BRIEF OF APPELLANT

DOUGLAS S. BOONE, MSB #3679
Attorney for Appellant
Gilchrist Sumrall Yoder & Boone, PLLC
P.O. Box 106
Laurel, MS 39441-0106
601-649-3351

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF STATE OF MISSISSIPPI

SANDERSON FARMS, INC. **APPELLANT**

VS. **NO. 2014-WC-00364-COA**

TANYA JESSIE **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court of Appeals may evaluate possible disqualification or recusal.

1. Tanya Jessie, Appellee

2. Floyd E. Doolittle, Esquire
   Attorney for Appellee
   460 Briarwood Drive, Suite 500
   Jackson, MS 39206

3. Douglas S. Boone, Esquire
   Attorney for Appellant
   Gilchrist Sumrall Yoder & Boone, PLLC
   P.O. Box 106
   Laurel, MS 39441-0106

4. Sanderson Farms, Inc.
   Appellant
   P. O. Box 1588
   Laurel, MS 39441-1588

5. Tristar Risk Management
   Third Party Administrator for Appellant
   P. O. Box 2805
   Clinton, IA 52733-2805

6. Administrative Law Judge Virginia Wilson Mounger
   Mississippi Workers' Compensation Commission
   P. O. Box 5300
   Jackson, MS 39296-5300

7. Chairman Liles B. Williams
   Mississippi Workers' Compensation Commission
   P. O. Box 5300
   Jackson, MS 39296-5300

8. Commissioner Debra H. Gibbs
   Mississippi Workers' Compensation Commission
   P. O. Box 5300
   Jackson, MS 39296-5300

9. Commissioner Thomas A. Webb
   Mississippi Workers' Compensation Commission
   P. O. Box 5300
   Jackson, MS 39296-5300

This the 17th day of July, 2014.

/s/Douglas S. Boone
Douglas S. Boone, Attorney For Appellant

Douglas S. Boone, MSB #3679
Gilchrist Sumrall Yoder & Boone, PLLC
P.O. Box 106
Laurel, MS 39441-0106
601-649-3351

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES OF THE COURT

STATEMENT OF THE ISSUES

1. The Mississippi Workers' Compensation erred in ordering permanent partial disability for one hundred (100) weeks with a 50% loss of use for industrial purposes relative to the right extremity followed by an additional one hundred (100) weeks representative of a 50% loss of use for industrial purposes for the left upper extremity as such was not based on substantial evidence and against the overwhelming weight of the evidence. Tanya Jessie, the Appellee, failed to prove a loss in excess of her functional or medical loss.
2. The Mississippi Workers' Compensation Commission erred in accepting Dr. Sheila Lindley's opinion as her opinions as to residual capabilities were not based on objective evidence but were based on mere speculation. The Mississippi Workers' Compensation Commission further erred in not giving Dr. Rahul Vohra's medical opinions greater weight as his opinions were based on objective evidence and not based on speculation.
3. The Mississippi Workers' Compensation Commission erred in allowing the testimony of Tom Stewart as a certified rehabilitation counselor as Mr. Stewart failed to take into consideration the residual capabilities of Jessie, failed to take into consideration actual jobs at Sanderson's plants and failed to take into consideration the opinions of Dr. Vohra. Mr. Stewart's opinions were without sufficient facts and data to support his opinion.

STATEMENT OF THE CASE

Tanya Jessie, the Claimant and now Appellee who is hereinafter referred to as Jessie, filed a Petition to Controvert alleging bilateral carpal tunnel syndrome as a result of her employment at Sanderson Farms, Inc's. Hazelhurst processing plant. Sanderson Farms, the Employer and now Appellant which is hereinafter referred to as Sanderson, accepted the injury and paid benefits. All temporary total disability benefits and medical benefits were paid as well as the bilateral upper extremity 6% rating assigned by Dr. Sheila Lindley. (T-p. 7, 11) A hearing was held and the Administrative Law Judge awarded permanent partial disability benefits in the amount of 50% to each upper extremity or 200 weeks. (Pleadings Vol. p. 32) The ultimate issue for determination was whether Claimant is entitled to any additional loss of industrial use in excess of her medical rating. Dr. Sheila Lindley assigned her a bilateral upper extremity 6% rating. Dr. Rahul Vohra stated that there was no justification for any rating or restriction. Sanderson contended the Administrative Judge erred in awarding a bilateral 50% upper extremity permanent partial disability award or 200 weeks. The Full Commission by a vote of 2 to 1 affirmed the award of the Administrative Judge. (Pleadings Vol. p. 104) Chairman Williams dissented and his dissent is as follows, to-wit:

> Although the Commission has voted to affirm the July 1, 2013, Order of the Administrative Judge, I respectfully disagree with that decision and must dissent. Based on the evidence presented in the record and in the briefs of the parties, I cannot find that the Claimant established a loss of industrial use in excess of her medical impairment ratings resulting from her work-related injury.
>
> "In a scheduled-member case, a worker is always entitled to compensation for the medical or functional loss of his body part, regardless of whether the functional loss impacts his wage earning capacity." *City of Laurel vs. Gavin Guy*, 58 So.3d 1223, 1226 (Miss. Ct. App. 2011). "Functional or Medical loss refers to physical impairment." *Id.* However, "industrial or occupational loss is the functional or medical disability as it affects the claimant's ability to perform the duties of employment." *Id.* "Of course, [the Claimant's] post-injury wage-earning capacity does not defeat scheduled-member compensation. *Id.* at 745 (¶13)

> (acknowledging statutory right to compensation for medical impairment regardless of impact on worker's ability to perform his job). It does not even defeat a finding of an industrial loss greater than (claimant's) 25% medical loss. ***But [the Claimant's] actual wage-earning ability is a strong circumstance that must be considered along with the evidence as a whole to determine to what extent, if any [the Claimant] suffered an industrial loss greater than his medical loss."*** *Id.*
>
> In the present case, it is undisputed that the Claimant is currently employed, and has been for two-years, within her restrictions with the Employer earning a higher wage than her pre-injury wage. Further, Dr. Rahul Vohra opined based on her history and normal nerve conduction study that the Claimant has no residual medial neuropathy in either upper extremity. Dr. Vohra opined that the Claimant is at maximum medical improvement with no basis for residual impairment or permanent restrictions.
>
> Based on the above and the evidence as a whole, the Claimant has failed to demonstrate that she sustained a loss of industrial use in excess of her medical impairment ratings; therefore, I dissent from the majority and would reverse the Order of the Administrative Judge and award the Claimant six (6%) loss of industrial use to each upper extremity. (Pleadings Vol. p. 109)

From the affirmance by the Full Commission by a 2 to 1 vote, Sanderson appeals to this Honorable Court. (Pleadings Vol. p. 111)

STATEMENT OF FACTS

Tanya Jessie, the Appellee (hereinafter referred to as "Jessie") was born on 05-09-69. (T-p. 8) She is a high school graduate. (T-p. 10) Prior to working at Sanderson Farms, the Appellant's (hereinafter referred to as "Sanderson"), Hazelhurst Processing Plant from which this claim arises, Jessie worked at Sanderson's Prepared Food Plant in Flowood. She was one of six line employees who performed the same task of straightening tenders before they went into "the grease". (T-p. 22, 25 through 28, and 31) Jessie testified that she could do that job today even under the restrictions of Dr. Lindley. (T-p. 28) Jessie's prior work also included housekeeping at a motel. Jessie testified in her deposition she could do the job of her prior employment as a housekeeper in a motel but testified in the hearing in this matter that she could

not do that prior job. (T-p. 25-28) Jessie further testified that she is fully capable of standing all day and that she does cooking and cleaning at her home and she does the shopping at the grocery store. She further testified that she washes dishes, makes her own bed, and drives a car. She testified that she drove about thirty minutes on the day of the hearing and that driving doesn't bother her. She further testified that she has no problems bending at the waist, sitting, thinking, talking, hearing or seeing. (T-p. 28-29).

Jessie testified that she contracted bilateral carpal tunnel syndrome with her work at Sanderson's Processing Plant in Hazelhurst. She further testified that after her surgery she returned to work at Sanderson's plant in Hazelhurst and resumed her employment as a line worker with Sanderson at the liver table wherein she would separate lungs, livers and hearts. (T-p. 14). Jessie testified that at the time of her injury, she was making $11.75 and that she was making $12.45 at the time of the hearing. (T-p. 31) Jessie's wage statement reflects that her pre-injury average weekly wage for the one year prior to her alleged injury was $415.33 and for comparison purposes, Jessie's post-injury wage statement was submitted as a part of and is reflected as Sanderson's Exhibit 6 which notes that in the one-year preceding hearing and post-injury return to work her average weekly wage was $442.86. Jessie is earning more post-injury and has not suffered a loss of wage earning capacity. Jessie has continued to work post-injury for Sanderson at the liver table for over two years. She has made no application to any other Employer. (T-p. 31)

Jessie has performed the "liver table job" at Sanderson since her return to work in April of 2011. Further, as far as her past employment, we know that she could do the job she was doing at Sanderson's Flowood plant straightening tenders. (T-p. 31) We also know that she testified in her deposition she could do the housekeeping job she had done in the past. She

denied being able to do housekeeping at the hearing in this matter. (T-p. 25-28) We further know that she, at the time of her injury, made $11.75 an hour with an average weekly wage of $415.33 and that she is now making $12.45 an hour with an average weekly wage of $442.86. (T-p. 31 and Exhibit 6)

The liver job is a regular line production job and she has been doing it over two years since her return to work and Sanderson's Hazelhurst plant has several people doing the same job on multiple shifts. The job is within the restrictions of Dr. Sheila Lindley which will be discussed later. (T-p. 69-73) We note Jessie offered the testimony of Thomas Stewart as a vocational consultant who was of the incorrect opinion the job was sheltered employment. Mr. Stewart has never been in the plant by his own testimony and had absolutely no basis for suggesting such. (T-p. 54) April Taylor, the Field Employees Relation Manager for Sanderson, testified in no uncertain terms that the liver table was a regular production job. Other employees do the same job on multiple shifts. (T-p. 69-72) Further, April Taylor stated there were other line production jobs at Sanderson's Hazelhurst plant which she could perform even under the restrictions of Dr. Lindley which are discussed later. April Taylor testified that she could perform all the tasks as a paw grader and that she could do the job on the liver table within the restrictions pronounced by Dr. Lindley. (T-p. 72) Jessie could also perform all past duties as a tender straightener at Sanderson's Flowood plant under the restrictions of Dr. Lindley and she could perform all her past duties at Sanderson at both plants by accepting the opinion of Dr. Vohra discussed below. Mr. Stewart also conceded she could perform all of her pre-injury work under the restrictions of Dr. Vohra.

Ms. April Taylor testified that both the liver job and paw grader job were both within the restrictions of Lindley as was Jessie's prior job at Sanderson's Flowood plant as a tender

straightener. These jobs were regular production jobs and they had numerous people working on both shifts doing those jobs. (T-p. 72)

Medical Evidence

Dr. Sheila Lindley

Dr. Sheila Lindley performed bilateral carpal tunnel releases and released Jessie at MMI on April 15, 2011. Jessie went back to work on the liver table at Sanderson Farms and she continues to do that job. Dr. Lindley opined that she could continue to do that work at the liver table which consisted of separating livers, hearts and lungs. Dr. Lindley noted the following restrictions, to-wit:

> Ms. Jessie is released for work activities which she is doing [liver table] no repetitive digital flexion extension or sustained gripping activities, which are of a continual nature.
>
> Ms. Jessie is to avoid scissor and knife use.
>
> Ms. Jessie is to avoid prolonged cold environment, meaning 50 degrees Fahrenheit for a prolonged period of time.
>
> Ms. Jessie is to only have intermittent use of air vibratory tools.
>
> Ms. Jessie is to avoid lifting, pushing or pulling greater than 20 pounds with either the left or right upper extremity.

Thereafter, on July 10th, Dr. Lindley made the following work restrictions:

> I do believe that her work restrictions should be five pounds or less left and right upper extremity. She may on an infrequent basis use both hands to lift up to twenty pounds but from a functional standpoint, I believe her frequent lifting should be limited to five pounds or less with both left and right upper extremities. The remainder of her restrictions will remain in place. Her impairment rating would also be unchanged.

Dr. Lindley's July 10, 2011, restrictions were based on an examination on May 30, 2011, which was the last time Dr. Lindley saw Jessie. It is noted that Dr. Lindley gave Jessie a 6%

impairment rating to the right upper extremity and a 6% to the left upper extremity. (See Jessie's Exhibit 1)

Dr. Rahul Vohra

Four months after Jessie's last visit with Dr. Sheila Lindley, she went for an evaluation with Dr. Rahul Vohra. In Dr. Vohra's report, he notes that her objective physical examination was normal. Jessie subjectively had some tenderness along the left wrist flexors and he suspected some mild wrist flexor tendonitis and Jessie also complained of some subjective numbness. Dr. Vohra, ordered a nerve conductions study. His findings on September 29, 2011, after the nerve conduction study were as follows, to-wit:

> Repeat upper extremity nerve conductions were done and these are normal. There is no evidence of residual medial neuropathy in either upper extremity. There is no evidence of mononeuropathy in either ulnar nerve and there is no evidence of peripheral neuropathy.
>
> Impression and Plan: In light of normal post-operative nerve conduction studies, it is my opinion that Ms. Jessie is at maximum medical improvement at this time and I do not believe she has any basis for residual impairment or restrictions. (Exhibit 4, RE p.8)

As noted above, Dr. Vohra who was the last physician to see Jessie and who conducted a nerve conduction study test four months after the last time Jessie had seen Dr. Lindley opined that there was absolutely no basis for restrictions or impairment rating. (EC Exhibit 4; RE p. 8)

As noted, Dr. Vohra was the last doctor to see Jessie. His report was sent to Lindley who opined that her restrictions were in place to "avoid a recurrence of her symptomology and recurrent carpal tunnel". (Claimant's Exhibit 1)

STANDARD OF REVIEW

The Standard of Review is stated in *Fresenius Medical Care Co. v. Woolfolk*, 920 So. 2d 1024 (Miss. App. 2005) as follows, to-wit:

> [1-4] ¶ 18. The standard of review in workers' compensation cases is limited. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 667 (¶6) (Miss. 2003). The substantial evidence test is used. *Id.* (citing *Walker Mfg. Co. V. Cantrell*, 577 So. 2d 1243, 1245-47 (Miss. 1991)). The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. *Id.* This Court will overturn the Workers' Compensation Commission decision only for an error of law or an unsupported finding of fact. *Id.* (citing *Georgia Pac. Corp. v. Taplin*, 586 So.2d 823, 826 (Miss.1991). Reversal is proper only when a Commission's order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. *Id.* (citing *Smith v. Jackson Constr. Co.*, 607 So.2d 1119, 1124 (Miss. 1992)). 920 So.2d at 1029
>
> ….
>
> [7] ¶ 27. The Mississippi Supreme Court has stated that it is not within the authority of a reviewing court to re-weigh the evidence in order to determine whether the preponderance of the evidence "might favor a result that is contrary to the Commission's determination." *Hollingsworth v. I.C. Isaacs and Co.,* 725 So.2d 251, 254(¶ 11) (Miss. Ct. App. 1998) "So long as there is substantial evidence in the record to support the Commission's findings, this Court is obligated to affirm the Commission." *Id.* at 254-55 (¶¶ 11-12). "Although it is true that the Workers' Compensation Commission is the trier of facts and its orders will be affirmed where there is substantial evidence to sustain its findings, nevertheless, the substantial evidence rule is sufficiently flexible to permit the Court to examine the record as a whole to check for errors." *Universal Mfg. Co. v. Barlow,* 260 So.2d 827, 831 (Miss. 1972). "Courts have often reversed the Workers' Compensation Commission when the Commission acted against the great weight of the testimony." *Id.* (citing *M.T. Reed Constr. Co. v. Garrett*, 249 Miss. 892, 164 So.2d 476, 477-78 (1964). 920 So.2d at 1031.

For reasons outlined herein, the decision by the Mississippi Workers' Compensation Commission was not supported by substantial evidence and was based on an erroneous application of the law.

SUMMARY OF ARGUMENT

This is a worker's compensation, carpal tunnel case. The Claim was accepted and benefits were paid. Dr. Sheila Lindley gave Jessie a 6% bilateral upper extremity rating and restrictions. Jessie was thereafter examined by Dr. Rahul Vohra who performed a post-injury nerve conduction study which was completely normal and determined that there was no reason for any restrictions or rating. The Administrative Judge after hearing found that Jessie had suffered a bilateral 50% upper extremity loss of industrial use. The decision was affirmed by the Full Commission by a 2-1 vote with Chairman Williams dissenting.

Jessie, the Appellee, after her maximum medical improvement returned to work on the line at Sanderson Farms. She returned on the liver table. April Taylor, Sanderson's Field Employee Relations Manager, testified that this was a regular production job. It was a job that other employees performed on both shifts. Jessie returned to work at Sanderson Farms and for over two years prior to hearing was making more money per hour and making more money per week post injury than she did pre-injury. She made $415.33 pre-injury per week and $442.86 post-injury per week. Based on recent cases as outlined in the argument, Jessie did not prove she had suffered any additional loss beyond her medical rating. The facts of this case are exactly the same as *Diane Gaston v. Tyson Foods*, 122 So.3d 797 (Miss. 2013) and Chairman Williams in his dissent quoted extensively from that well-reasoned case.

We believe it was error to make an award in excess of the medical rating. We believe Chairman Williams was correct. We also note that it was error to accept Dr. Sheila Lindley's opinion as to residual capabilities as her opinions were speculative. It was further error not to give Dr. Rahul Vohra's opinions priority as his opinions were based on objective evidence. Specifically, Dr. Vohra conducted a post-injury nerve conduction study which showed that there was no evidence

of further carpal tunnel syndrome as her EMG nerve conduction study was completely normal. Dr. Vohra, based on the objective findings, stated that there was absolutely no basis for restrictions or impairment rating. In our argument we cite cases in which this Court has noted that a judgment cannot be based on speculation. Dr. Lindley's opinions were merely speculative but Dr. Vohra's opinions were based on objective evidence.

In our third argument we note that Jessie's vocational expert testified that Jessie's job with Sanderson was "sheltered employment". He had no basis for this testimony. He had never been in Sanderson's plant in Hazelhurst. Further, April Taylor testified in no uncertain terms that the position that Jessie was working at Sanderson's Hazelhurst Plant post-injury was a regular line production position and which multiple employees performed this job on multiple shifts. Jessie's vocational expert, Tom Stewart, had no basis for his opinions and his opinions should have been stricken and disregarded.

For reasons stated, we believe the award by the Commission should be reversed. The Commission lacks substantial evidence to make the award. Claimant is making more money in a regular production job which is her customary and usual occupation. Her objective medical tests were normal and there was no basis for restrictions or rating. Further, Claimant's vocational expert failed to consider Dr. Vohra's opinion nor did he consider actual jobs at Sanderson. His opinions were fatally flawed.

ARGUMENT

I.

The Mississippi Workers' Compensation erred in ordering permanent partial disability for one hundred (100) weeks commiserate with a 50% loss of use for industrial purposes relative to the right extremity followed by an additional one hundred (100) weeks representative of a 50% loss of use for industrial purpose for the left upper extremity as such was not based on substantial evidence and against the overwhelming weight of the evidence. The Appellee failed to prove a loss in excess of her functional or medical loss.

The Court of Appeals of the State of Mississippi, recently issued its ruling in an important case styled as *Diane Gaston vs. Tyson Foods*, 122 So. 3d 797 (Miss. App. 2014). In that case, the Court of Appeals affirmed the decision of the Full Commission noting that Gaston had not established any additional loss of industrial use in excess of her medical ratings as she was currently employed within her restrictions and was earning a higher wage rate than her pre-injury wage. This case is identical to the case at bar. In *Gaston* the Claimant had bilateral upper extremities injuries and a lower extremity injury. She was given permanent partial disability ratings to each extremity which were paid by Tyson. She was denied any additional industrial loss in excess of the ratings as she was currently employed within her restrictions earning a higher wage than her pre-injury wage. **These are exactly the facts of the current case**. In this case, similarly, Jessie was working post-injury at the liver table, and was making a wage in excess of her pre-injury wage. In *Gaston* the Court held as follows:

> Gaston argues that the Commission's ruling is against the overwhelming weight of the evidence, and that she is entitled to an industrial loss of use greater than the medical impairment ratings assigned by her treating physicians.
>
> Mississippi Code Annotated Section 71-3-17 (Supp. 2012) provides compensation for employees for permanent total disability, temporary total disability, and permanent partial disability. In a permanent-partial-disability case, also called a scheduled-member case, the statute assigns a percentage of compensation for a set number of weeks to be paid to the employee. Additionally
>
> > In a scheduled member case, a worker is always entitled to compensation for the medical or functional loss of his body part, regardless of whether the functional loss impacts his wage-earning capacity. But the law recognizes there may be times when the industrial loss is greater than the medical loss. In these cases, the claimant's industrial or occupational disability or loss of wage-

> earning capacity controls his degree of disability. *City of Laurel v. Guy*, 58 So. 3d 1223, 1226 (¶ 14) (Miss. Ct. App. 2011) (internal citations and quotations omitted).
>
> For an employee to receive an industrial disability, he must "prove (1) [a] medical impairment, and (2) that the medical impairment resulted in a loss of wage earning capacity." *Robinson v. Packard Elec. Div., Gen. Motors Corp.*, 523 So. 2d 329, 331 (Miss. 1988). Additionally, this Court has "held loss of wage-earning capacity should be determined by considering the evidence as a whole." *Guy*, 58 So. 3d at 1227 (¶18).
>
> Gaston relies on *Meridian Professional Baseball Club v. Jensen*, 828 So. 2d 740 (Miss. 2002), to support her contention that she is entitled to an industrial loss of use – namely the fact that Jensen was unable to return to his prior employment as a professional baseball player after his injury.
>
> *Id.* at 743 (¶7). Gaston asserts that she was unable to return to her work in the washout department and had to be moved twice to accommodate her injuries. We find this argument unpersuasive because Gaston has maintained her employment with Tyson through all of her injuries, and, as of the date of this appeal, she is still employed with Tyson, which has accommodated her restrictions.
>
> Gaston and Tyson agree that she suffered medical impairments from the three injuries. However, Gaston fails to prove she has suffered a loss in wage-earning capacity. She testified before the AJ that her wage at the time of the hearing was more than at the time of the three injuries. (122 So. 3d at 799-800).

Therefore, according to the Court of Appeals decision as stated above, Jessie has failed to prove a loss of industrial use in excess of her medical rating. There is no dispute that Jessie was making $11.75 per hour at the time she was injured while performing work for Sanderson. In addition, there is no dispute that Jessie returned to work with Sanderson making $12.45 an hour at the time of the hearing. Her average weekly wage one year prior to injury was $414.33 per week. Her post-injury return to work average weekly wage was $442.86. She made more per hour and more per week when she returned to work than her pre-injury wage. Furthermore,

there is no dispute that Jessie was not terminated, suspended, or reduced in seniority or pay by Sanderson. She was a line worker pre-injury and a line worker post-injury. She was performing her usual and customary job as a line worker post-injury and making more money doing that work post-injury. Therefore, according to the Court of Appeals and *Gaston*, Jessie is not entitled to anything above her prescribed impairment rating.

In addition, the Court of Appeals recently, on April 29, 2014, again ruled and declared that a Claimant who suffered both body as a whole and scheduled member injuries had failed to prove a loss of wage earning capacity or loss of industrial use due to the undisputed fact that the Claimant returned to work at a job within her restrictions and making more money per hour than she was at the time of her workplace injury. (See, *Lovett v Delta Regional Medical Center;*--So. 3d--, 2014 WL 1687925 (Miss. App. 2014)). In *Lovett*, the Court of Appeals stated that the Mississippi Supreme Court established, "A rebuttable presumption of no loss of wage-earning capacity when the Claimant/Appellee's post-injury wages are equal to or exceed his pre-injury wage." *Gregg v Natchez Trace Electric Power Association*, 64 So.3d 473, 476 (Miss. 2011). (2014 WL 1687925, at 9). The Court of Appeals noted in Lovett that her pre-injury hourly wage was $9.14, and her post-injury wage was $9.32. Therefore, based upon these facts the Court concluded that Lovett had failed to establish that she suffered a loss of wage earning capacity. In fact the Full Commission and Court of Appeals ruled as follows:

> Based on the evidence presented and the applicable law, [Lovett] has failed to rebut the presumption that she has sustained no loss of wage-earning capacity as a result of her March 8, 2016, injury due to her higher post-injury wage. Therefore, we find that [Lovett] did not meet her burden to establish that she suffered any loss of wage-earning capacity in regards to her alleged back injury or loss of industrial use in excess of the medical impairment rating in regards to her alleged right lower extremity injury. (2014 WL 168795 at 12)

As shown above, the Court of Appeals has been consistent regarding this issue. The bottom line is that Jessie's wage increased when she returned to work at Sanderson. She returned as a line employee on the liver table. She was a line employee at the time of her injury and a line employee after her return to work. A rebuttable presumption was created, and pursuant to the cases cited herein the Appellee failed to overcome that presumption. She is not entitled to any additional compensation for a rating in excess of the functional loss rating. Dr. Lindley gave her a bilateral 6% rating and Dr. Vohra advised that there was no basis for restrictions or rating based upon objective nerve conduction studies.

The relevant facts of this case are very clear and undisputed. There is no dispute that Jessie was making $11.75 per hour and $415.33 per week at the time of her alleged workplace injury. In addition, there is no dispute that Jessie returned to work within her respective restrictions with Sanderson, and this job paid her $12.45 and $442.86 per week, which is a clear increase in wages. It is clear and undisputed that Jessie's wage increased when she returned to work at Sanderson. Therefore, pursuant to the case law cited herein, a rebuttable presumption was created. Furthermore, pursuant to the cases cited above, Jessie failed to overcome that presumption. According to the Mississippi Supreme Court and the Mississippi Court of Appeals, Tanya Jessie is not entitled to anything above her impairment rating. Dr. Lindley gave her a 6% rating to each upper extremity. Dr. Vohra noted there was no justification for any rating or restrictions. It was error for the Administrative Judge to grant Jessie a bilateral 50% rating. Chairman Williams in his dissent so noted. There is no medical or legal basis for a judgment in excess of the medical rating. She has suffered no industrial loss or loss of wage earning capacity. The award is clearly excessive for someone who is making more now than she was making pre-injury. In addition, this award clearly flies in the face of the existing law as declared by the

Court of Appeals and the Mississippi Supreme Court.

In reviewing the case law cited herein only one conclusion can be reached. That conclusion is that the Courts have ruled and declared that a Claimant does not suffer a loss of wage earning capacity or an industrial loss when that Claimant returns to work with the Employer making the same money from that Employer. It is extremely important to note that these cases are very recent and are extremely similar. The Courts are speaking with one clear voice on this issue, and pursuant to this clear voice the opinion must be reversed. Therefore, we respectfully move that the AJ's Order affirmed by a 2 to 1 vote before the Full Commission be reversed.

II.

The Mississippi Workers' Compensation Commission erred in accepting Dr. Sheila Lindley's opinion as her opinions as to residual capabilities were not based on objective evidence but were based on mere speculation. The Mississippi Workers' Compensation Commission further erred in not giving Dr. Rahul Vohra's medical opinions greater weight as his opinions were based on objective evidence and not based on speculation.

On September 14, 2012, four months after Jessie's last visit with Dr. Sheila Lindley, (May 30, 2012) she went for an evaluation with Dr. Rahul Vohra. In Dr. Vohra's report, he notes that her objective physical examination was normal. Jessie subjectively had some tenderness along the left wrist flexors and Jessie also complained of some subjective numbness. Dr. Vohra, ordered a nerve conductions study. His findings on September 29, 2012, after the nerve conduction study were as follows, to-wit:

> Repeat upper extremity nerve conductions were done and these are normal. There is no evidence of residual medial neuropathy in either upper extremity. There is no evidence of mononeuropathy in either ulnar nerve and there is no evidence of peripheral neuropathy.
>
> Impression and Plan: <u>In light of normal post-operative nerve conduction studies, it is my opinion that Ms. Jessie is at maximum</u>

> medical improvement at this time and I do not believe she has any basis for residual impairment or restrictions. (Exhibit 4) (emphasis added)

As noted above, Dr. Vohra who was the last physician to see the Claimant and who conducted a nerve conduction study test over four months after the last time Jessie had seen Dr. Lindley opined that there was absolutely no basis for restrictions or impairment rating.

As noted, Dr. Vohra was the last doctor to see Jessie. His report was sent to Lindley who opined on December 18, 2012, that her restrictions were in place to "avoid a recurrence of her symptomology and recurrent carpal tunnel syndrome."

The Claimant has the general burden of proof to establish every essential element of her claim, and it is not sufficient to leave the matter to surmise, conjecture or speculation. *Erwin v. Hayes*, 236 Miss. 123, 109 So. 2d 156 (Miss. 1959). The burden of proof is upon the Claimant to prove these elements beyond speculation and conjecture. *Id.* In the case of *Narkeeta Inc. vs. McCoy*, 247 Miss. 65, 153 So. 2d 798 (Miss. 1963), the Claimant's medical testimony from the doctor stated in terms of possibility and not probability. *Id.* The Mississippi Supreme Court held that the testimony was insufficient and that the Claimant had not met her burden. *Id.* This is similar to the case at hand. Dr. Lindley stated in her December 18, 2012, letter responsive to Dr. Vohra's report as follows, "She did demonstrate a clinical flare in her symptomology when she changed her work activities even to a small degree. I would therefore, not change the restrictions which are currently in place to avoid recurrence of her symptomology and recurrent carpel tunnel syndrome." (Emphasis added). This opinion is purely speculative as it is based solely on the subjective complaints of Claimant and the possibility that carpal tunnel symptomology may recur in the future. The chance that Claimant's symptoms may recur in the future is insufficient under Mississippi law to obtain recovery.

In the case of *Franks v. Goyer Company*, 234 Miss. 833, 108 So. 2d 217 (Miss. 1959), the Court held that mere possibility does not suffice to forge the casual link between accident and disability. *Id.* The Court further held that the evidence for the Claimant did not show a probability that the Claimant's work contributed to or aggravated or accelerated his injury, but it showed only a bare possibility. *Id.* The Court stated that even long before Mississippi had a worker's compensation law, the Supreme Court had repeatedly held that recoveries must rest upon reasonable probabilities and not upon mere possibilities. *Id.* Dr. Lindley's opinion pertains to future disability and problems. With regard to future disability and problems, the Court of Appeals has held that hypothetical arguments of possible future disability and medical treatment are too speculative and lacks any merit. *Baker v. IGA Super Value Food Store,* 990 So. 2d, 254 Miss. Ct. App. (2008). In *Baker*, the Court considered Claimant's argument that his condition could worsen to a point that he suffers a physical permanent partial disability or require further medical treatment such as surgery. *Id.* The Court held that the medical evaluations revealed that the Claimant would not benefit from further injections or surgery but instead, doctors recommended more active physical therapy. *Id*. In the present case, Lindley's restrictions were put into place for the sole purpose of avoiding a future injury. The restrictions were <u>not</u> put into place because of any existing medical evidence.

This exact situation occurred in the case of *Eddie Prowell, Claimant v. Johnson Electric Automotive, Employer*, 2012 WL 6509281 (Miss.Work.Comp.Com.). (RE p. 17) In that case, Dr. Lindley assigned restrictions to the Claimant to avoid a future recurrence of carpal tunnel syndrome. However, Dr. Vohra opined that the Claimant did not have median neuropathy as evidenced by his postoperative EMG/nerve conduction studies, therefore, there was no basis for impairment or restrictions based on carpal tunnel syndrome. The Commission addressed this and

found that the medical evidence as a whole, including Dr. Vohra's opinion, carried more weight than Lindley's opinion. The Commission found that the Claimant had no restrictions related to carpal tunnel syndrome, and thus had no industrial loss of use. The facts in *Prowell* are nearly identical to this case. Note: Employer is not citing *Prowell* as controlling or even secondary authority as the case was apparently never appealed beyond the Full Commission. The case is discussed due to the near identical factual pattern, i.e. carpal tunnel syndrome, restrictions to avoid possible future recurrence and both of the doctors involved in the present case – Vohra and Lindley. (A copy of the case is attached to Record Excerpts p.17)

In *Rodgers vs. Shelby Group International Inc*., 805, So. 2d 627, (Miss. Ct. App. 2002), the Claimant was diagnosed with carpel tunnel syndrome by her family physician. *Id*. The family physician referred her to another doctor who placed her at MMI following a left-sided release. *Id*. Just like the present case, she was also seen by an Independent Medical Examiner who performed testing which returned all normal results. In the present case, Dr. Vohra based his opinion on the medical evidence and found that the nerve conduction studies were normal and there was no evidence of a residual medial neuropathy in either upper extremity. He found that there was no evidence of mononeuropathy in either ulnar nerve and there was no evidence of a peripheral neuropathy. The Court in *Rodgers* provides excellent guidance for this exact situation. The Claimant argued that the Commission erred in failing to order the Employer to pay for her alleged ongoing medical needs. *Id.* She claimed that her treating physicians all recommended further treatment and that payment for such treatment should be granted to her. *Id*. The Court of Appeals upheld the Commission ruling that the Employer was not responsible for any medical supplies claimed by the claimant after her MMI date. *Id*. The *Rodgers* case

provides this Court with an excellent roadmap for this carpal tunnel case involving normal studies and involving future impairment.

The bottom line is that Dr. Lindley's opinion as to future medical treatment is strictly speculative and is based solely upon the subjective complaints of the Claimant. Dr. Vohra's opinions were based upon objective medical testing. In the case law cited above, Mississippi Courts have repeatedly held that objective findings override subjective complaints of the Claimant. Accordingly, the Court should reverse the findings of the Commission.

III.

The Mississippi Workers' Compensation Commission erred in allowing the testimony of Tom Stewart as a certified rehabilitation counselor as Mr. Stewart failed to take into consideration the residual capabilities of Jessie, failed to take into consideration actual jobs at Sanderson Farms' plants and failed to take into consideration the opinions of Dr. Vohra. Mr. Stewart's opinions were without sufficient facts and data to support his opinion.

Tom Stewart, Jessie's vocational expert, labeled Jessie's job at the liver table as sheltered employment. There was absolutely no credible basis for that opinion. Jessie's expert, Mr. Stewart, had never been in Sanderson's Plant in Hazelhurst or Flowood. (T-p. 54) April Taylor, the Field Employee Relations Manager at Sanderson's plant, testified in no uncertain terms that the liver table job was a regular production job. Further, April Taylor stated there were other production jobs at Sanderson's Hazelhurst Plant which she could perform even under the restrictions of Dr. Lindley. April Taylor further testified she could perform all the tasks of a paw grader and she could do the job at the liver table within the restrictions of Dr. Lindley. Jessie could also perform all past duties as a tender straightener at Sanderson's Flowood Plant under the restrictions of Dr. Lindley. Tom Stewart's report failed to include this information that she was a tender straightener at Sanderson's Flowood Plant and she could perform all duties of such even under Lindley's restrictions. Further, Jessie could perform all her past duties at Sanderson at both plants by accepting the opinion of Dr.

Vohra. Tom Stewart's report failed to even include Dr. Vohra's opinions.

April Taylor testified that both the liver job and the paw grader job were both within the restrictions of Lindley as was Jessie's prior job at Sanderson's Flowood Plant as a tender straightener. These jobs were regular production jobs. They had numerous people working on both shifts doing these jobs. Mr. Stewart failed to take such into consideration in this report.

The Mississippi Supreme Court has never adopted *Daubert* in worker's compensation matters. However, that does not give an expert license to offer opinions with no basis in fact. The Court in *Fresenius* basically stated that if an expert's premises are without foundation, then the opinion must also be without merit. In *Fresenius Medical Care Co. v. Woolfolk*, 920 So. 2d 1024 (Miss. App. 2005), the Court stated that if the premise upon which an expert in a worker's compensation case is flawed, "…then it necessarily follows that the opinion is flawed." 920 So. 2d at 1032. Not only objectionable under *Fresenius* but also objectionable under Miss. Rules of Evidence Rule 702 which dictates that expert opinions be based upon sufficient facts and data which are reliable. Mr. Stewart totally ignored the facts as presented by April Taylor's testimony and Dr. Vohra's opinions as to her residual capabilities.

In the case at bar, Mr. Stewart, Claimant/Appellee's expert had never been in Sanderson's Hazelhurst or Flowood plants and had no basis for declaring her job sheltered employment. As noted, Ms. April Taylor, the Field Employee Relations Manager at Sanderson, so stated it was, in fact, a production job and that other people did that job on both shifts. She further noted there were other jobs within Sanderson's Hazelhurst Plant and within Sanderson's Flowood Plant that Jessie could perform. Her job at the Flowood Plant was straightening tenders which was a regular production job which she could do today. Mr. Stewart failed to include that job in his report. None of these jobs were "sheltered employment". Mr. Stewart's opinion should have been stricken and

not relied upon by the Commission and it was plain error to do so. Mr. Stewart also wrote a report which failed to include Dr. Vohra's opinion notwithstanding Dr. Vohra's opinions were specifically accepted and Dr. Lindley's opinion was specifically rejected by the Mississippi Workers' Compensation Commission in *Prowell v. Johnson Electric Automotive,* MWCC No. 01-12675-H-2515, which is a case not distinguishable from the facts of this case. (A copy of that case is attached to our Record Excerpts p. 17.) Mr. Stewart's opinions should have been stricken as they were without accurate foundation. We objected to the same but our objections were overruled. It was error to do so. (T-p. 4, p.38)

CONCLUSION

Based upon the above stated, we believe the award by the Commission should be reversed. The Commission lacked substantial evidence to make the award. Jessie is making more money in a regular production job which is her customary and usual occupation. Her objective medical tests were normal and there was no basis for restrictions or rating. Further, Jessie's vocational expert failed to consider Dr. Vohra's opinions, nor did he consider actual jobs at Sanderson. His opinions were flawed.

Respectfully submitted this the 17th day of July, 2014.

Respectfully submitted,

SANDERSON FARMS, INC.

By: /s/Douglas S. Boone
Its Attorney

Douglas S. Boone, MSB #3679
Gilchrist Sumrall Yoder & Boone, PLLC
Post Office Box 106
Laurel, Mississippi 39441-0106
Telephone: (601) 649-3351

CERTIFICATE OF SERVICE

I, Douglas S. Boone, do hereby certify that I have this day electronically filed the above and foregoing **BRIEF OF APPELLANT** with the Clerk of the Court using the MEC System which sent notification of such filing to the following:

Floyd E. Doolittle, Esquire
460 Briarwood Drive, Suite 500
Jackson, MS 39206
floydedoolittle@msn.com
Attorney for Appellee

I do hereby further certify that I have this day served a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** by mailing a true and correct copy of the same, postage prepaid to:

Mississippi Workers' Compensation Commission
P. O. Box 5300
Jackson, MS 39296-5300

This the 17th day of July 2014.

/s/Douglas S. Boone
Douglas S. Boone